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STRIKES AND BOYCOTTS. — Labor's two great weapons in industrial competition are the strike and the boycott. In the last thirty years, the use of these weapons has given rise to so great a mass of litigation[1] that there is a growing recognition of the necessity of formulating a definite and convincing rationale on which cases can be decided.[2] It is often affirmed that thus far the courts have failed to meet the test adequately;[3] and it is undoubtedly true that the law of labor-disputes furnishes glaring examples of the use of misleading catch-phrases and of frequent discrepancy between legal precedent and economic fact. The

[1] The following are various compilations of cases: FRANCIS B. SAYRE, SYLLABUS for a course in Labor Law (delivered at Harvard Law School, 1920-1921); CARSON, INTERNAL LAW OF TRADE UNIONS; GROAT, ATTITUDE OF AMERICAN COURTS IN LABOR CASES, 3–6; LAIDLER, BOYCOTTS AND THE LABOR STRUGGLE, appendix. For a collection of every known labor case in this country prior to 1842, less than forty in all, see A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY. For English cases prior to 1906, see REPORT OF THE ROYAL COMMISSION ON TRADE DISPUTES AND TRADE COMBINATIONS, 95 *et seq.*

[2] It is not within the scope of this note to discuss the expediency of injunctive relief; and equitable and legal remedies will be treated as on a parity. There has been so much criticism of the use of injunctions in labor disputes. See Charles C. Allen, "Injunction and Organized Labor," 28 AM. L. REV. 828; I. B. Rosenblum, "The Use of Injunctions in Labor Disputes," 4 ST. LOUIS L. REV. 18, 78. It has never been used so much in England as in the United States. See SIDNEY & BEATRICE WEBB, THE HISTORY OF TRADE UNIONISM, Rev. ed. 1920, 599. A Massachusetts statute abolishing the use of injunctions in labor disputes was held unconstitutional. Bogni *v.* Perotti, 224 Mass. 152, 112 N. E. 853 (1916). For a criticism of this case see 30 HARV. L. REV. 75.

[3] See Wm. D. Lewis, "Modern American Cases Arising out of Trade and Labor Disputes," 44 AM. L. REG. (N. S.) 465, 491–492. See also A. V. Dicey, "Combination

indisputable need for further clarification gives vital interest to the question.

A strike has been defined [4] as "a simultaneous cessation of work on the part of workmen." Strikes are called for a variety of objects, and it is with the legality of these objects that the law is concerned.[5] As a whole, these objects fall into two general classes, though any classification is purely suggestive: (1) Strikes for immediate needs, like higher wages, shorter hours, better working conditions, etc. (2) Strikes for the strengthening of the unions — which include strikes to secure recognition of unions, strikes to secure re-employment of discharged fellow-workmen or the discharge of non-union workmen, strikes for the closed shop or the enforcement of closed shop agreements, strikes to enforce payment of fines imposed by the unions on employers or workmen, and so-called sympathetic strikes. First of all, what have the authorities to say as to the legality of each of these types?

(1) The simplest form, the strike for higher wages, shorter hours, or better working conditions, is everywhere recognized as legal.[6] The Massachusetts cases, chaotic on other points, are at least clear here. A rarer form is the strike to enforce the employment of a larger number of men than the employer desires — *e. g.* an organist in a theater refuses to work unless an orchestra of five is employed, as union rules demand. Massachusetts [7] holds this illegal, while the Minnesota court [8] takes the

Laws and Public Opinion," 17 HARV. L. REV. 511, 532: "The confusion reaches much deeper than a mere opposition between the beliefs of different classes. Let each man . . . look within. He will find that inconsistent social theories are battling in his own mind for victory . . . If then the law be confused, it all the more accurately reflects the spirit of the time."

[4] See Farrer *v.* Close, L. R. 4 Q. B. D. 602, 612 (1863), *per* Hannen, J.

[5] Though there has been much authority to the contrary, and though it is not possible to state it as absolute truth, it seems to be the better rule that what one man may do lawfully a combination of men may do lawfully. It would seem curious that a sort of legal "legerdemain" should create illegality out of legality merely on account of the number of the actors. See Lindsay & Co., Ltd. *v.* Montana Fed. of Labor, 37 Mont. 264, 273, 96 Pac. 127, 130 (1908). See also Jeremiah Smith, "Crucial Issues in Labor Litigation," 20 HARV. L. REV. 345, 351. See *contra*, Allis Chalmers Co. *v.* Iron Moulders Union, 150 Fed. 155, 176 (1906); State *v.* Dalton, 134 Mo. App. 517, 537, 114 S. W. 1132, 1139 (1908). Now the settled definition of a conspiracy is a "combination of two or more persons to accomplish some criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful, by criminal or unlawful means." Commonwealth *v.* Hunt, 4 Metc. (Mass.) 111, 123 (1842). Thus, as quitting work is lawful even though by combination, we come eventually to the proper consideration in the strike cases; *i. e.*, not loose talk about unlawful conspiracy and coercive combinations, but the legality of the purpose for which the strike is called. For a list and discussion of early English statutes which have had a bad effect in keeping the unsupportable view of conspiracy alive, see National Protective Ass'n of Steam Fitters *v.* Cumming, 170 N. Y. 315, 332, 63 N. E. 369, 373 (1902).

[6] Karges Furniture Co. *v.* Amalgamated Woodworkers Union No 131, 165 Ind. 421, 75 N. E. 877 (1905); Pickett *v.* Walsh, 192 Mass, 572, 78 N. E. 753 (1906); Cohn & Roth Electric Co. *v.* Bricklayers Union, 92 Conn. 161, 101 Atl. 659 (1917).

[7] Haverhill Strand Theatre *v.* Gillen, 229 Mass. 413, 118 N. E. 671 (1918). The court argues that similarly all carpenters could refuse to work on buildings unless they were ten stories high. The simile presents action that seems perfectly legal. It would not be doubted that capital could refuse to invest itself on similar conditions. The case clearly illustrates a situation that should be left entirely to control by economic forces.

[8] Scott-Stafford Co. *v.* Minneapolis Musicians, 118 Minn. 410, 136 N. W. 1092 (1912).

opposite view. (2) The strike as part of the campaign for the unionization of industry is but a step removed from the strike for higher wages or shorter hours; yet here the decisions are contradictory. New York [9] allows the strike to secure recognition of the union, to force discharge of non-union men, or to effect a closed shop; Massachusetts [10] adopts the contrary view, and each state is followed by a number of other jurisdictions. The strike to enforce payment of fines imposed on employers or union-members because of the breach of some union rule seems uniformly to be held illegal.[11] The sympathetic strike, so-called, has also been uniformly condemned in *dicta* from other decisions.[12] Strikes are admittedly illegal which involve defamation, fraud, actual physical violence, threats of physical violence, or inducement of breach of contract; [13] and these are dismissed from further consideration.[14]

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[9] Nat'l Protective Ass'n *v.* Cumming, *supra;* Kemp *v.* Division No. 241, 255 Ill. 213, 99 N. E. 389 (1912); Gray *v.* Bldg. Trades Council, 91 Minn. 171, 97 N. W. 663 (1903). The English law prior to 1906 was in confusion. Allen *v.* Flood, [1898] A. C. 1; Quinn *v.* Leatham, [1901] A. C. 495. See REPORT OF THE ROYAL COMMISSION ON TRADE DISPUTES AND TRADE COMBINATIONS, 24–30. But such strikes were rendered legal by 6 EDW. VII, c. 47 (TRADE DISPUTES ACT, 1906). *Cf.*, however, Valentine *v.* Hyde, [1919] 2 Ch. 129. The strike to enforce an agreement for a closed shop should stand on the same footing. An early case in New York held such an agreement illegal when made between an employers' association and a union. Curran *v.* Galen, 152 N. Y. 33, 46 N. E. 297 (1897). Between an employer and a union such an agreement has been upheld. Jacobs *v.* Cohen, 183 N. Y. 207, 76 N. E. 5 (1905); Kissam *v.* United States Printing Co., 199 N. Y. 76, 92 N. E. 214 (1910); Nat'l Fireproofing Co. *v.* Mason Builders Ass'n, 169 Fed. 259 (1909).

[10] Plant *v.* Woods, 176 Mass. 492, 57 N. E. 1011 (1900); State *v.* Dyer, 67 Vt. 690, 32 Atl. 814 (1895); Ruddy *v.* United Ass'n of Plumbers, 79 N. J. L. 467, 75 Atl. 742 (1910); Bausbach *v.* Reiff, 237 Pa. 482, 85 Atl. 762 (1912); Connors *v.* Connolly, 86 Conn. 641, 86 Atl. 600 (1913). An early case decided by Shaw, C. J., seems to have held exactly the opposite of Plant *v.* Woods, *supra.* Commonwealth *v.* Hunt, *supra.* See comment by Holmes, J., dissenting in Vegelahn *v.* Guntner, 167 Mass. 92, 109, 44 N. E. 1077, 1082 (1896). *Cf.* however Minasian *v.* Osborne, 210 Mass. 250, 96 N. E. 1036 (1911) (strike to force discharge of employee's helper on ground there was not enough work to go around held legal). A recent case, however, enjoined a strike called to make the employer re-employ a discharged employee. Mechanics' Foundry & Machine Co. *v.* Lynch, 128 N. E. 877 (1920). For the facts of this case, see RECENT CASES, page 891, *infra.* A union shop agreement has been held illegal. Berry *v.* Donovan, 188 Mass. 353, 74 N. E. 603 (1905). But agreements to give preference in hiring to union men have been upheld. Hoban *v.* Dempsey, 217 Mass. 166, 104 N. E. 717 (1914); Shinsky *v.* O'Neil, 232 Mass. 99, 121 N. E. 790 (1919).

[11] Fines on members. Brennan *v.* United Hatters of No. America, 73 N. J. L. 729, 65 Atl. 165 (1906). *Cf.* Conway *v.* Wade, [1909] A. C. 506 (giving effect to TRADE DISPUTES ACT 1906 but upholding a finding by the jury that no trade dispute was involved). Fines on employers. Carew *v.* Rutherford, 106 Mass. 1 (1870); March *v.* Bricklayers Union, 79 Conn. 7, 63 Atl. 291 (1906); State *v.* Dalton, 134 Mo. App. 517, 114 S. W. 1132 (1908).

[12] See Reynolds *v.* Davis, 198 Mass. 294, 300, 84 N. E. 457, 459 (1908); Duplex Printing Press Co. *v.* Deering, 41 Sup. Ct. 172, 178 (1921). See also STIMSON, HANDBOOK TO THE LABOR LAW OF THE UNITED STATES, 222.

[13] 6 EDW. VII, c. 47, § 3, abolishes even this exception in trade disputes. See also COOKE, THE LAW OF COMBINATIONS, etc., 2 ed., § 27.

[14] Intentional Aggression. This might be listed as another exception to the rule that all strikes are legal. The authorities for the most part seem to follow the view laid down by Lord Lindley in Quinn *v.* Leatham, 533, *supra*, that "an act otherwise lawful although harmful does not become actionable by being done maliciously in the sense of proceeding from a bad motive and with intent to annoy or harm another." It is possible, however, on the ground of the social interest in the general security, to

This, then, is the state of the authorities.[15] It is next necessary to consider what is or should be the method of approach to these cases. The prevalent view is that the affirmative action of the strikers is *prima facie* actionable, and therefore requires justification if the strike is to be held legal.[16] The legal standard by which justification is found to be sufficient or insufficient is virtually "public policy." The phrase discloses at once the source of confusion, and the occasion of the charges of judicial bias in labor cases. It inevitably increases the chance for decisions on first impressions, decisions that reflect merely the fluctuating and perhaps inadequately informed economic views of judges at a given time or place.[17]

In recent years, there has been a growing attempt among juristic writers to subject "public policy" to analysis and explanation — to attempt to find objective criteria by which it may be tested, and to eliminate, as far as possible, the courts' internal and subjective impressions which make it uncertain in application.[18] There is clear progress in this, even though it is impossible to arrive at any standard having quite the exactness of a rule of property law. This newer method seeks to ascertain the interests involved in any given situation, and to base its decision on a balancing of those interests. Certain interests are indisputable. Others are perhaps doubtful and need to be explained by their relation to these non-controversial interests. In cases concerning

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make a strong argument the other way. See James B. Ames, "How Far an Act May be a Tort Because of the Wrongful Motive of the Actor," 18 HARV. L. REV. 411; GROAT, ATTITUDE OF AMERICAN COURTS IN LABOR CASES, 221; POUND, OUTLINES OF LECTURES ON JURISPRUDENCE, 3 ed., 43. But even though the latter rule is adopted, it needs careful application and is usually not relevant in cases arising out of trade disputes. See Ames, *supra*, 418, note.

[15] Where a strike is called for both a legal and an illegal purpose, a question arises as to the legality of the whole strike. See Willcutt & Sons Co. *v.* Driscoll, 200 Mass. 110, 85 N. E. 897 (1908). The most recent statement, a *dictum*, holds such a strike illegal. See Baush Machine Tool Co. *v.* Hill, 231 Mass. 30, 36, 120 N. E. 188. 188 (1918). *Cf.* GROAT, ATTITUDE OF AMERICAN COURTS IN LABOR CASES, 251 *et seq.*

[16] See Vegelahn *v.* Guntner, *supra*, dissenting opinion by Holmes, J.; Plant *v.* Woods, *supra;* Jeremiah Smith, "Crucial Issues in Labor Litigation," 20 Harv. L. Rev. 253, 262.

[17] See O. W. Holmes, Jr., "Privilege, Malice, and Intent," 8 HARV. L. REV. 1, 8. See also FINAL REPORT OF THE COMMISSION ON INDUSTRIAL RELATIONS, 90 (reprinted from SENATE DOC. NO. 415, 64th Congress). Single words have been some of the worst offenders in building up theories in labor law. "*Threats.*" But a "threat" is only notice of one's intention to do something. See Jeremiah Smith, *supra*, 20 HARV. L. REV. 253, 273. A "threat" to do something legal is therefore legal. "*Coercion*" or "*Compulsion.*" These words are altogether nebulous. See criticism of their use by Shaw, C. J., in Commonwealth *v.* Hunt, *supra*, 132. A recent article on the subject of labor law rashly uses "coercion" as if it had an accepted meaning. 30 YALE L. J. 407. "*Extortion*" (in the case of levying and collection of fines). The simple answer is that "extortion" only occurs when a threat to do something illegal is present. "*Malice.*" See James B. Ames, "How Far an Act May be a Tort Because of the Wrongful Motive of the Actor," 18 HARV. L. REV. 411, 422: note: "If so 'slippery' a word were eliminated from legal arguments and opinions, only good would result."

[18] See Jeremiah Smith, *supra*, 20 HARV. L. REV. 345, 361; O. W. Holmes, Jr., *supra*, 8 HARV. L. REV. 1, 3; Roscoe Pound, "Interests of Personality," 28 HARV. L. REV. 343, 344; Note on "Boycotts on Materials," 31 HARV. L. REV. 482. See also POUND, OUTLINES OF LECTURES ON JURISPRUDENCE, 3 ed., 79–90. For an early recognition of the presence of social interests in economic controversies, see opinion by Shaw, C. J., in Commonwealth *v.* Hunt, *supra*.

strikes, the social interest in peace or general security and the social interest in economic progress are at once important. If the evident interest of society in industrial peace and unimpeded production were the sole consideration, all strikes might be held illegal. Over against this, however, is the social interest in economic progress. Whatever might be the considerations under another economic order, our law has always recognized the social interest in freedom of competition, and has frequently said that competition with all its cruelties is worth all that it costs.[19] Incidental to the social interest in economic progress is also the social interest in the strengthening of labor combinations, because conditions which pit a single employee against an aggregation of capital are not conditions of free competition. To-day few would deny the social interest in the existence of labor-unions, or question the interest in effecting through them a more evenly balanced system of bargaining between employer and employee. If, then, these vital interests are to be satisfied, the unions must have some effective means wherewith to back up the demands essential to their functioning.

There are also individual interests of substance involved. The employer has an interest in freedom of contract, in carrying on his business as he pleases without dictation, in "hiring and firing" whom he pleases.[20] But to offset this, there is also the employee's interest in freedom of contract, in selling his labor to whom, and under what conditions, he pleases, in working with whom he pleases. No list of the interests involved can be exhaustive. Unfortunately, moreover, a balance between these interests cannot be struck with mathematical precision. But it seems that though the individual interests cancel each other, the social interest in industrial peace and a maximum of production is outweighed by the social interest in economic progress through the maintenance of free competition and the strengthening of labor combinations. In the balance, then, the interests on the side of the strikers prevail. The best principle to adopt or to enact into legislation is that of California,[21] and of England since the Trade Disputes Act of 1906,[22] that all strikes which do not involve the admitted exceptions of defamation, fraud, physical violence, threats of physical violence, or inducement of breach of contract,[23] are legal.[24]

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[19] See Mogul Steamship Co., Ltd. *v.* McGregor, Gow & Co., 23 Q. B. D. 598 (1889), [1892] A. C. 25; Nat'l Protective Ass'n *v.* Cumming, *supra*, 330.

[20] Of course where non-union men, against whom the unions proceed, are concerned, their individual interests of a similar nature are also to be thrown into the scales.

[21] See Parkinson Co. *v.* Bldg. Trades Council of Santa Clara County, 154 Cal. 581, 98 Pac. 1027 (1908).

[22] 6 EDW. VII, c. 47.

[23] *Cf.* note 13, *supra*.

[24] Lockouts present converse situations to strikes and are to be appraised by the same standards. If a given strike is legal, a lockout to resist that strike is legal. Lefebvre *v.* Knott, 32 Quebec Sup. Ct. 441, 13 Can. Cr. Cas. 223 (1907). *Cf.* Cote *v.* Murphy, 159 Pa 420, 28 Atl. 190 (1894). Strikes for political purposes undoubtedly infringe so far on the state's regular governmental processes that they must be considered illegal. See REPORT OF THE ROYAL COMMISSION ON TRADE DISPUTES AND TRADE COMBINATIONS, 23. For a discussion of these strikes, see WEBBS, HISTORY OF TRADE UNIONISM, Rev. ed. 1920, 669 *et seq.* The recent dissolution of the *Confédération Générale du Travail* by a minor French court was based on the ground of wrongful political action by the *C. G. T.* in the general railway strike of May, 1920, for nationalization of the railways. See NEW YORK TIMES, Jan. 14, 1921.

Boycott cases present the same problems and are subject to the same methods of solution as strike cases. Judges and writers define primary and secondary boycotts in such widely divergent ways [25] that it is better to deal with concrete situations than with an abstract classification. An organization may, acting as a body of consumers, refuse to buy of the plaintiff. This situation is so common and so naturally a concomitant of the competitive system in industry that courts assume it to be legal and usually do not even term it a boycott at all. It is rarely used by labor.[26] Another situation arises when the defendants bring third parties, like wholesalers, or consumers, or employers, into the dispute and try to induce or persuade them not to deal with the plaintiff. This is done in various ways, — by threats of strikes or loss of business, or merely by publication of the "Unfair List," which asks friends of the boycotters not to deal with the proscribed employers. Practically all jurisdictions [27] hold such kinds of action illegal,[28] with the exception of Montana, which allows a boycott by publication of the "Unfair List," [29] and of California, which allows all boycotts.[30] In the *Danbury Hatters* case [31] and the *Bucks Stove* case,[32] the Supreme Court of the United States held that the publication of an "Unfair List" in interstate commerce was illegal under the Sherman Act.

Finally, there is the so-called "boycott on materials," [33] now made famous by the *Duplex* case,[34] where, in order to bring pressure on the

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[25] See, for example, Lindsay & Co., Ltd. *v.* Montana Fed. of Labor, *supra*, 272; Gray *v.* Bldg. Trades Council, *supra*; 30 HARV. L. REV. 632; LAIDLER, BOYCOTTS AND THE LABOR STRUGGLE, 64; WOLMAN, THE BOYCOTT IN AMERICAN TRADE UNIONS, 14. For the origin of the term "boycott," see LAIDLER, *supra*, 23–27. If is often difficult, especially in cases involving strikes to force the discharge of fellow-workmen, to draw any black line between strikes and boycotts. See Wm. D. Lewis, *supra*, 44 AM. L. REG. (N. S.) 503 *et seq.*

[26] See LAIDLER, *supra*, 64.

[27] Any statement about boycotts must be made with a reservation about state statutes concerning Restraint of Trade which may have a bearing on any particular case. For these statutes, see COOKE, THE LAW OF COMBINATIONS, etc., 2 ed., § 204 *et seq.*

[28] Wilson *v.* Hey, 232 Ill. 389, 83 N. E. 928 (1908); Beck *v.* Ry. Teamsters Union, 118 Mich. 497, 77 N. W. 13 (1898); Gray *v.* Bldg. Trades Council, *supra*; Barr *v.* Essex Trades Council, 53 N. J. E. 101, 30 Atl. 881 (1894); Booth *v.* Burgess, 65 Atl. 226 (N. J.) (1906); Auburn Draying Co. *v.* Wardell, 227 N. Y. 1, 124 N. E. 97 (1919).

[29] Lindsay & Co. *v.* Montana Fed. of Labor, *supra*. *Accord*, Heitkamper *v.* Hoffman, 99 N. Y. Misc. 543, 164 N. Y. Supp. 533 (1917); Sinsheimer *v.* United Garment Workers, 77 Hun, 215, 28 N. Y. Supp. 321 (1894) (*semble*); Marx & Haas Jeans Clothing Co. *v.* Watson, 168 Mo. 133, 67 S. W. 391 (1902) (*semble*). See also Iverson *v.* Dilno, 44 Mont. 270, 119 Pac. 719 (1911); Empire Theater Co. *v.* Cloke, 53 Mont. 183, 163 Pac. 107 (1917).

[30] See Parkinson Co. *v.* Bldg. Trades Council of Santa Clara County, *supra*.

[31] Lawlor *v.* Loewe, 235 U. S. 522 (1915). See also Loewe *v.* Lawlor, 208 U. S. 274 (1908).

[32] Gompers *v.* Bucks Stove & Range Co., 221 U. S. 418 (1911).

[33] See 31 HARV. L. REV. 482.

[34] Duplex Printing Press Co. *v.* Deering, 41 Sup Ct. 172 (1921). For the facts of this case see RECENT CASES, page 891, *infra*. Pitney, J., wrote the majority opinion, which was concurred in by White, C. J., and McKenna, Day, Van Devanter, McReynolds, JJ. Brandeis, J., wrote the dissenting opinion, which was concurred in by Holmes, Clarke, JJ. Reports of the case in the lower courts are in 247 Fed. 192; 252 Fed. 722, 164 C. C. A. 562.

plaintiff, workmen refuse to expend labor on materials which their employers buy from the plaintiff. The Supreme Court, six to three, held this illegal under the Sherman Act,[35] and decided that the Clayton Act [36] did not render it legal. The importance of the case [37] entitles it to detailed attention. There were in this country four manufacturers of newspaper printing presses, all in competition. The International Association of Machinists, an organization with some 60,000 members, sought to have these four manufacturers recognize the union and the union standards of work, such as the eight-hour day. Three had done so. The Duplex plant in Michigan refused. Two of the other three then told the union that the exigencies of competition with the Duplex non-union standards would force them to end their agreements with the union. The union thereupon called a strike in the Duplex plant, and sought to have its members in New York City boycott the Duplex presses, that is, refuse to install, repair, or do other work on them. The legality of this boycott under the Sherman and Clayton Acts was the question at issue.

It seems that the majority opinion to the effect that it was illegal is not supportable, because it makes two major errors. (1) It does not appreciate the real facts, and had it done so, would, according to its own test, have decided the case differently. Mr. Justice Pitney says the benefits of § 20 of the Clayton Act are limited to those "who are proximately and substantially concerned as parties to an actual dispute respecting the terms or conditions of their own employment, past, present, or prospective." [38] When the unionization of the four companies was dependent on the unionization of the Duplex plant, and when the result of the Duplex plant's refusal was to jeopardize the union principle under which the union members were employed, it seems wrong to say that the Machinists in New York had no substantial interest in the dispute.[39] (2) The opinion is wrong, or at least misleading, in terming this a secondary boycott, to be treated according to the same principles (apart from the Clayton Act) as the publication of an "Unfair List" in the *Danbury Hatters* case. In New York (and the action in the *Duplex* case was brought in a federal court in that state), where a boycott by an "Unfair List" is held illegal, it is nevertheless well settled that refusal to work on non-union materials is justifiable.[40] Some other cases are in

[35] 26 STAT. AT L. 209.

[36] 38 STAT. AT L. 730. Section 20 among other things provides that "peacefully persuading any person to work or abstain from working, or Recommending, advising, or persuading others by peaceful and lawful means so to do" shall not be prohibited by injunction "in any case between an employer and employees, or between employers and employees involving or growing out of a dispute concerning terms or conditions of employment." The resolution of the ambiguity in the last clause was in effect the issue in the Duplex case. That ambiguity would not have been enacted if the legislators had been intelligently forewarned by reading REPORT OF THE ROYAL COMMISSION ON TRADE DISPUTES, etc., 15, and 6 EDW. VII, c. 47, § 5 (3). For early criticism of the Clayton Act soon after its adoption see "Labor Provisions of the Clayton Act," 30 HARV. L. REV. 632; Wm. H. Taft, 39 AMER. BAR. ASS'N REPORTS, 359, 378.

[37] See Francis B. Sayre, "The Clayton Act Construed," THE SURVEY, Jan. 22, 1921. See also comment by counsel, NEW YORK TIMES, Jan. 4, 1921.

[38] 41 Sup. Ct. 172, 178.

[39] See Brandeis, J., dissenting, p. 184.

[40] Bossert *v.* Dhuy, 221 N. Y. 342, 117 N. E. 582 (1917); Reardon *v.* Caton, 189

accord.[41] The courts thus have made a distinction between these two types of cases and have refused to consider this situation as involving the usual so-called secondary boycott. Consequently the court's quotations from Congressional sponsors of the Clayton Act[42] to the effect that it was not intended to legalize secondary boycotts are beside the point.

Altogether it seems that (subject of course to the exceptions of defamation, fraud, physical violence, etc., mentioned under strikes) all boycotts where third parties are concerned — whether involving threats to do legal acts, "Unfair Lists," or strikes on materials — should be treated alike, and held to be legal. The only valid distinction from the strike cases is that here the struggle often concerns "neutrals," [43] involves industrial war to a point one degree removed from the employer-employee relation. Is then the social interest in keeping the struggle in close limits sufficient to override the social interest in economic progress and the strengthening of the unions? For several reasons, the answer should be No. First, it is often hard to see that boycotts really do carry the industrial struggle further than strikes. Not only are strikes and boycotts often indistinguishable; but also with society as closely interrelated as it is today, it is not unreasonable to say that there are third parties affected by strikes almost as directly as are the "conscripted neutrals" in boycotts. There is, moreover, much weight (as well as much cause for concern in our courts' reputation for non-partisanship) in the fact that in trade disputes between employers, courts have been ready to hold that actions analogous to labor boycotts are legal,[44] and thus have recognized the compelling importance of the social interest in free competition, even in struggles not confined strictly to two parties. Finally, it seems clear that once the social interest in the organization of unions has been recognized they should not be deprived of one of the chief methods of making that organization effective, unless that method is indisputably harmful.[45]

But in the end, though all strikes and boycotts (subject to the admitted exceptions) are recognized as legal, as actions with which the courts should not interfere, it must be perceived that such methods are only wasteful and primitive makeshifts. Underneath all the legal

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N. Y. App. Div. 501, 178 N. Y. Supp. 713 (1919). See also Buyer *v.* Guillan, 63 N. Y. L. J. 1625 (Fed.) (1920).

[41] Grant Construction Co. *v.* St. Paul Bldg. Trades Council, 136 Minn. 167, 161 N. W. 520 (1917); State *v.* Van Pelt, 136 N. C. 633, 49 S. E. 177 (1904). *Contra*, Lohse Patent Door Co. *v.* Fuelle, 215 Mo. 421, 114 S. W. 997 (1908); Purvis *v.* Local No. 500, 214 Pa. 348, 63 Atl. 585 (1906); Burnham *v.* Dowd, 217 Mass. 351, 104 N. E. 841 (1914).

[42] 51 CONG. RECORD 9652, 9653, 9658.

[43] See Jeremiah Smith, *supra*, 20 HARV. L. REV. 253, 278.

[44] See Payne *v.* Western R. R. Co., 13 Lea (Tenn.) 507 (1884); Haywood *v.* Tillson, 75 Me. 225 (1883); Raycroft *v.* Tayntor, 68 Vt. 219, 35 Atl. 53 (1896) — involving threats to discharge employee if he patronized plaintiff. See also United States *v.* United Shoe Machinery Co. of New Jersey, 247 U. S. 32 (1918) — "tying clauses" in leases of shoe machinery upheld. *Cf.* Cote *v.* Murphy, *supra* (trade boycott involving third parties to the dispute held legal); Macauley Bros. *v.* Tierney, 19 R. I. 255, 33 Atl. 1 (1895); Mogul Steamship Co., Ltd. *v.* McGregor, Gow & Co., *supra*. For laws of foreign countries as to boycotts see LAIDLER, BOYCOTTS, 251–254.

[45] GROAT, *supra*, 255.

aspects of trade disputes is the necessity of devising some adequate economic means for their real settlement. [46]

CREDITORS' RIGHTS AGAINST THE RECIPIENT OF FUNDS WHICH IMPAIR THE CAPITAL OF A CORPORATION. — In a recent Tennessee case,[1] an assignee for the benefit of creditors sued to recover sums paid out of the capital stock by the corporation to the defendant who accepted them in payment of a personal debt of a stockholder. It did not appear that the defendant knew that the sums were paid out of capital. The court dismissed the plaintiff's bill.

The statutes under which this corporation was organized and issued its capital stock are similar to those usually in force.[2] A fair interpretation of these statutes warrants the conclusion that the legislatures clearly intended the capital stock of a corporation to be a margin of safety for its creditors.[3] The general rule is that a solvent individual is unrestrained master of his assets and may dispose of them freely or even capriciously, provided he remains solvent after such dispositions. But by the grant of corporate privileges, individuals are enabled to profit from the transactions of a business without being exposed to unlimited liability for the obligations incurred in the conduct of that business. The legislatures, therefore, are especially jealous of the rights of the creditors of the corporation. The margin of safety must be preserved. Consequently, the corporation cannot make any and every disposition of its capital it chooses, even though it remain solvent after such disposition.

The contemplated margin of safety for creditors, present and future, may be reduced in consequence of losses sustained in the legitimate undertakings of the corporation. The creditors must be expected to take the risk of those losses. But the legislature does not authorize the corporation to apply its capital to the payment of personal debts of stockholders.[4] Further, the legislature does not intend that the contemplated margin of safety be reduced through the return of the capital,[5]

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[46] *Cf.* Sidney Webb's Memo in REPORT OF THE ROYAL COMMISSION ON TRADE DISPUTES, 18. See also Henry B. Higgins, "A New Province for Law and Order," 29 HARV. L. REV. 13, 32 HARV. L. REV. 189 (reprinted in NAT'L CONSUMERS LEAGUE PUBLICATION No. 106), 34 HARV. L. REV. 105, dealing with the Commonwealth Court of Conciliation and Arbitration in Australia.

[1] Memphis Lumber Co. *v.* Security Bank and Trust Co., 226 S. W. (Tenn.) 182 (1920). For the facts of this case see RECENT CASES, page 891, *infra.*

[2] See 1896 LAWS OF NEW JERSEY, c. 185, §§ 29, 47, 48; 1890 LAWS OF NEW YORK, c. 564, §§ 42, 44, 57; and compare with 1905 ACTS OF TENNESSEE, c. 174, § 1; 1915 PUBLIC ACTS OF TENNESSEE, c. 108, § 1.

[3] Seignouret *v.* Home Insurance Co., 24 Fed. 332 (1885). See 4 THOMPSON, CORPORATIONS, 2 ed., § 3660.

[4] *In re* Haas Co., 131 Fed. 232 (1904); American Wood Working Machinery Co. *v.* Norment, 157 Fed. 801 (1908); Ward *v.* City Trust Co., 192 N. Y. 61, 84 N. E. 585 (1908). See 1 COOK, CORPORATIONS, 7 ed., § 3.

[5] Lockhart *v.* Van Alstyne, 31 Mich. 76 (1875). The force of this objection is reduced when a solvent corporation is in liquidation and where the rights of creditors are not involved. Dupee *v.* Boston Water Power Co., 114 Mass. 37 (1873).